Supreme Court, U.S.
FILED
JUL 31 2000
CLERK

No. 99-1927

IN THE
Supreme Court of the United States

TARGET CORPORATION,

Petitioner,

v.

LAURA HOLLISTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT LAURA HOLLISTER

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U.S. Sup. Ct. R. 10 1

Respondent, Laura Hollister ("Hollister" or "Respondent"), respectfully files her opposition to the Petition for Writ of Certiorari of Petitioner, Target Corporation, formerly known as Dayton Hudson Corporation ("Dayton Hudson" or "Petitioner") to review the judgment of the United States Court of Appeals for the Sixth Circuit in *Hollister v. Dayton Hudson Corporation*, 201 F.3d 731 (6th Cir. 2000).

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that review on a writ of certiorari is not a matter of right, but of judicial discretion, and that this Court may grant such a petition only for compelling reasons. Pursuant to Rule 10, compelling reasons may exist, *inter alia*, if: (i) a decision prompting the petition creates a conflict of authority between the courts of appeal and/or state courts of last resort; (ii) the United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court; or (iii) the lower court's decision departs from the usual course of judicial proceedings.

Dayton Hudson has not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. Indeed, the Court rarely exercises this discretion when the alleged error is the misapplication of a properly stated rule of law. Here, Petitioner contends that the Sixth Circuit's decision does not comport with Michigan law, and requests the extraordinary relief that this Court modify the holding in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). If this Court were to accept Petitioner's argument, virtually every case in which a federal court applied state law would

be appropriate for review by this Court. Moreover, the Sixth Circuit's decision does not conflict with Michigan State Law, but is derived from the Michigan Supreme Court holdings in *Piercefield v. Remington Arms Company*, 375 Mich. 85, 133 N.W.2d 129 (Mich. 1965) and *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 365 N.W.2d 176 (1984).[1]

STATEMENT OF THE CASE

Petitioner's Statement of the Case includes numerous mischaracterizations and misstatements of fact. Respondents offer the following to correct the record.

A. THE ACCIDENT

Petitioner alleges that Hollister was "injured in a mysterious fire" and that the "circumstances of the fire are unknown". (Pet., p. 4) This conveniently omits the fact that both the Evanston Fire Department and the United States Bureau of Alcohol, Tobacco and Firearms ("ATF") investigated the fire. The Evanston Fire Department Incident Report concluded that the fire started in Hollister's kitchen when Hollister's clothing was ignited while she was cooking. These findings were confirmed by the ATF. The ATF Investigator made the following findings regarding the origin of the fire, and Hollister's actions after her shirt caught fire:

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1. The *Piercefield* decision remains the law in Michigan, and has been cited favorably in some one hundred and sixty-four cases and treatises since 1965. This includes *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 365 N.W.2d 176 (Mich. 1984), a case upon which Dayton Hudson principally relies.

The origin of the fire was in the kitchen. The victim's clothing was apparently ignited by the burner on the electric stove while she was cooking. Firefighters arriving to assist the ambulance crew reported that the right front and right rear burners were red hot. Ms. Hollister was wearing a plaid shirt that buttoned up the front and a second pullover top under that. She was apparently not wearing any skirt or slacks so the shirttail may have moved onto the burner while she reached into a cabinet over the stove. The fire spread on her clothing and some burned cloth fell to the kitchen floor. She apparently attempted to put out the flames by leaning over the counter in an attempt to smother the flames. She next ran into the bathroom and attempted to put out the flames using water from the tub, more of the burning material fell to the floor in the bathroom and burned the center of a small throw rug and the tile floor beneath it. The victim then filled the tub and soaked in it because more burned clothing was found in the tub full of water. The tub apparently overflowed soaking the carpeting in the hall and damaging the bottom of the plasterboard walls. The victim subsequently went to her bedroom and rested on the bed as more burned clothing (some wet) and some evidence of body fluids were visible there. These observations were made from the combination of eye witnesses, fire fighters, and the evidence of normal fire progression during the origin and cause determination.

(Joint Appendix ("JA") A0493) Based upon the above findings, the ATF investigator concluded:

> After careful examination of this fire scene along with any relevant reports it is my opinion that the cause of this fire should be classified as accidental caused by ignition of the victim's clothing by the stove burner while she was cooking.

(JA 0493)

Due to the severity of the fire, few remnants of the shirt remained. They only consisted of a cuff, a piece of the front of the shirt with a button hole and button, and a single-ply piece. Due to the severely deteriorated condition of the remaining pieces, it was impossible to determine the manufacturer. It is not true, as Dayton Hudson states at page 5 of the petition, that "Plaintiff never disclosed sufficient information for Hudson's, . . . , to identify the manufacturer of the blouse or to verify whether it even sold the blouse." Both plaintiff's and defendant's experts examined the remnants, and neither was able to determine the manufacturer. In addition, it was Dayton Hudson, as conceded in their interrogatory responses, who failed to retain records dating back to 1988 sufficient to determine when it sold the blouse, or the blouse's manufacturer. (JA A0496-0498)

B. THE BURNER TESTS

Dayton Hudson's petition challenges Hollister's burner tests performed by plaintiff's fabric expert, Dr. David Hall, Professor Emeritus of Textile Engineering at Auburn University, and implies (as it does throughout the Petition)

that it somehow did not receive a "fair shake". Dayton Hudson asserts it "has never had discovery on the tests, nor has it been allowed to challenge the admissibility of the test . . . ." (Pet., p. 6 n.2) However, this assertion is disingenuous. The Sixth Circuit's amended opinion properly noted that Dayton Hudson's own expert initially identified the exemplar fabric and concluded it was identical to the subject fabric. The opinion states:

> In his deposition on October 31, 1997, Dayton Hudson's causation expert, John Campbell, acknowledged that he had located an "exemplar" shirt composed of fabric identical to that used in the shirt involved in the accident. Hollister's counsel subsequently purchased identical shirts to the one that Campbell had identified, and gave them to Dr. Hall for examination and testing.
>
> Dr. Hall determined that the characteristics of the exemplar fabric were substantially identical to the shirt that Hollister had been wearing at the time of the accident.

(App. pp. 6a-7a)

The exemplar fabric tested by Dr. Hall and originally identified by Dayton Hudson's expert, Mr. Campbell, was purchased at a Dayton Hudson store.

C. FAILURE TO WARN

Hollister's failure to warn claim is predicated upon the assertion that the blouse burned explosively, and that had it contained a warning label, Laura Hollister's mother would

not have purchased the blouse. Petitioner alleges that Hollister "produced no evidence to support her failure-to-warn claim." Once again, Dayton Hudson is mistaken. The Amended Opinion cites a portion of Hollister's evidence as follows:

> Hollister's mother stated in an affidavit that she would not have bought the shirt for her daughter if she had known that the shirt was extremely flammable[2], and Hollister herself mentioned in an affidavit that she would not have worn the shirt in question if she had possessed such knowledge.[3] A reasonable jury could find, based on this evidence, that the shirt's failure to carry a warning was a proximate cause of her injuries.

(App. pp. 19a-20a)

D. THE DISTRICT COURT AND APPELLATE COURT DECISIONS.

On March 27, 1996, Hollister's parents filed the present action on her behalf in the Wayne County, Michigan, Circuit Court. It was removed to the United States District Court for the Eastern District of Michigan on July 11, 1996. The suit charged that Dayton Hudson was negligent and breached an implied warranty by selling a highly flammable shirt and by failing to warn of the shirt's dangerous flammability. Other defendants were originally named in the action, but were subsequently dismissed from the case. Hollister was eventually substituted for her parents as plaintiff in the action.

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2. Affidavit of Diane Hollister (JA A0529)

3. Affidavit of Laura Hollister (JA A0527)

On May 12, 1998, the District Court awarded Dayton Hudson summary judgment. (*See* App. pp. 23a-46a) On August 25, 1999, a panel of the Sixth Circuit Court of Appeals affirmed. (*See* App. pp. 22a-1 – 22a-16) On September 7, 1999, Hollister filed a Combined Petition for Panel Rehearing and Rehearing *En Banc*. Petitioner filed a response to Plaintiff's Petition for Rehearing *En Banc*. On January 13, 2000, the same panel filed an amended opinion, reversing summary judgment as to Plaintiff's failure to warn claim, but affirming summary judgment as to the design defect claim. (App. pp. 1a-22a) On January 27, 2000, each party filed a petition for rehearing *en banc*, which was circulated to the original panel members and all other active judges of the Court. On March 2, 2000, the Court of Appeals denied both parties' Petitions For Rehearing *En Banc*. (App. pp. 47a-48a) The opinion and order noted that the issues raised in the Petitions were fully considered upon the original submission and decision of the case.

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT'S OPINION IS CONSISTENT WITH MICHIGAN STATE LAW.

This Court need only review the Michigan State Supreme Court's decisions in *Piercefield v. Remington Arms Company*, 375 Mich. 85, 133 N.W.2d 129 (Mich. 1965) and *Prentis v. Yale Manufacturing Company*, 421 Mich. 670, 365 N.W.2d 176 (Mich. 1984), to confirm that an overhaul of the federal system is not necessary and that the principles articulated in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), were not offended by the Circuit's Amended

Opinion. The Circuit Court simply applied Michigan's long-standing rule of law recognizing that implied warranty and negligence are separate and distinct theories of recovery (*See Piercefield*, at 134, and *Prentis*, at 186), that may only converge when the reasonableness of a *manufacturer's* conduct is in issue and the factual focus is on the *adequacy* of the warnings provided by the manufacturer. (*Gregory v. Cincinnati Incorporated*, 450 Mich. 1, 11-12, 538 N.W.2d 325 (Mich. 1995), citing *Smith v. E.R. Squibb & Sons*, 405 Mich. 79, 89-91, 273 N.W.2d 476, 479 (Mich. 1979).)[4] Dayton Hudson's status as a non-manufacturing seller prevents the convergence of these two theories. (*Prentis*, 365 N.W.2d at 186 n.30.)

Petitioner asserts that the Amended Opinion "adopted liability without fault" (Pet. p. 17), and therefore, it ignored Michigan state law. The Amended Opinion does no such thing. Liability without fault, or strict liability,[5] was not addressed, much less mentioned, in the Circuit's opinion. The Court adhered to the mandates of the Michigan Supreme Court in *Piercefield* and *Prentis*, which both recognize that "concepts of negligence and fault, as defined by negligence standards, have no place in warranty recovery cases. Proof of negligence is unnecessary to liability for breach of implied warranty and the lack of it is immaterial to defense thereof." (*Piercefield*, 133 N.W.2d at 134; *cf. Prentis*, 365 N.W.2d at 186.)

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4. Dayton Hudson, as the retailer, did not provide any warnings with the blouse. (App. p. 19a)

5. Petitioner erroneously states, at p. 16, that "the court adopted strict liability against retailers."

Indeed, in reviewing the *Piercefield* decision, the Michigan Supreme Court in *Prentis*, followed its holding and quoted directly therefrom, stating in pertinent part: "Some quibbler may allege that this is liability without fault. It is not. . . ." The Court continued, and stated: "We do not agree . . . that this Court abandoned fault concepts in Piercefield. * * * Nor do we interpret the decision in Piercefield as an adoption of the concept of strict liability in tort." (*Id.* at 181 n.9)

The Amended Opinion does not adopt strict liability in tort. It simply recognizes, as the Michigan Supreme Court had before it, that Hollister's implied warranty/failure to warn cause of action focuses on the fitness of the product rather than the conduct of the manufacturer. *See Prentis*, 365 N.W.2d at 186 ("We do not dispute the generally recognized distinction between the elements of negligence and breach of warranty. We recognize that the negligence theory generally focuses on the defendant's conduct, requiring a showing that it was unreasonable, while warranty generally focuses upon the fitness of the product, irrespective of defendant's conduct.") Therefore, as the Circuit Court noted, the two causes of action identify different dangers associated with the product. Design defect addresses a product that could reasonably have been designed in a safer manner, whereas implied warranty/failure to warn "applies to a product that may be designed in an optimally safe way, but nevertheless bears a latent danger that would not be apparent to an ordinary consumer." (App. p. 17a)

In reversing the District Court on the implied warranty/ failure to warn claim, the Circuit adhered to the Michigan Supreme Court's holding in *Prentis*. The Circuit observed:

> A suit for breach of implied warranty against a seller *who is also the manufacturer* will therefore require the same showing of negligence on the defendant's part as an ordinary products liability suit against a manufacturer. ***See Prentis v. Yale Mfg. Co.***, 421 Mich. 670, 365 N.W.2d 176, 186 (Mich. 1984); ***Smith v. E.R. Squibb & Sons, Inc.***, 69 Mich. App. 375, 245 N.W.2d 52, 56 (Mich. Ct. App. 1976), **aff'd**, 405 Mich. 79, 273 N.W.2d 476 (Mich. 1979) (emphasis added)
>
> When the defendant is a ***non-manufacturing seller***, however, the two analyses diverge. **See, *Prentis***, 365 N.W.2d at 186 n. 30 ("Thus . . . the only time the distinction between implied warranty and negligence may have any significance in design defect cases, is in determining the liability of a seller who is not also the manufacturer of a product."). Because the existence of a defect is generally determined by the negligent conduct of the manufacturer, a retailer may be held liable for breaching its implied warranty of merchantability by selling a defective product, even if the retailer's conduct is wholly free from negligence. (citations omitted)[6]

(emphasis added)

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6. This is consistent with negligence law, which focuses on the defendant's conduct, requiring a showing that it was unreasonable, while warranty generally focuses on the fitness of the product, regardless of the defendant's conduct. *See Gregory v. Cincinnati Incorporated*, 450 Mich. 1, 538 N.W.2d 325, 329 n.8 (Mich. 1995); *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 692 (Mich. 1984).

Dayton Hudson's Petition disregards the aforementioned plain language of the Michigan Supreme Court and, instead, suggests that the holding in *Smith v. E.R. Squibb & Sons, Inc.*, 405 Mich. 79, 273 N.W.2d 476 (Mich. 1979), is controlling. Dayton Hudson states: "The panel's distinction, however, has no basis in Michigan law. The Michigan Supreme Court expressly rejected this distinction in *Smith v. E.R. Squibb & Sons, Inc.*, 273 N.W.2d 476 (Mich. 1979). . . ." (Pet., p. 19)

The above quote is not only an erroneous characterization of the law, but quite curious, given that the Michigan Supreme Court decided *Prentis*, the case which the Circuit relied upon in formulating the distinction between manufacturer and retailer, some five years after *Squibb*. Respondent fails to see how the *Squibb* holding could possibly "reject" the above "distinction" promulgated in *Prentis*, some five years *after Squibb*. Moreover, *Squibb* is inapposite to our facts, and not controlling, as it: (1) pertains to manufacturers and not retailers sued under breach of warranty or negligence, (2) addresses "adequacy" of warnings, not whether warnings were actually given, (3) is fact intensive, and (4) specifically states "Note should be made, however, that On different facts it could be prejudicial error Not to give the implied warranty instruction." (*Id.*, 273 N.W.2d at 480.)[7]

Rather than diverging from decisions of Michigan's highest and intermediate courts, the Circuit's Amended Opinion is consistent with Michigan state law. *Prentis* provides that an implied warranty claim does not require

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7. The jury in *Squibb* found the warnings adequate.

plaintiff to prove the retailer's negligence, but only that the product was defective and that the defect caused the injury.[8]

Lastly, Petitioner's citation, at Footnote 10, to several cases for the proposition that Michigan Federal and State Courts have unanimously held that claims of failure to warn against a non-manufacturing seller under either a theory of implied warranty or negligence are to be treated as claims of negligence, is misplaced.[9] Other than *Glittenberg v. Doughboy Recreational Industries*, 441 Mich. 379, 491 N.W.2d 208 (Mich. 1992), each case citation therein pertains to the liability of a manufacturer or involves the "adequacy" of a given warning. *Glittenberg* is the only case which pertains to a retailer, and the suit therein was dismissed based upon the open and obvious nature of the danger.

Dayton Hudson is simply wrong when it argues "The court of appeals adopted exactly what the Michigan Supreme Court had rejected: a divergent treatment of failure-to-warn claims under implied warranty and negligence theories." and "The Sixth Circuit pointed to no line of authorities or legislative developments that would justify ignoring *Squibb* and *Coy*[10]." (Pet., p. 19) The Sixth Circuit did not follow the

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8. It is well settled that failure to provide a warning can constitute a product defect. (*E.g., Gutowski v. M & R Plastics & Coating, Inc.*, 60 Mich. App. 499, 231 N.W.2d 456 (Mich. Ct. App. 1975); *Berkebile v. Brantly Helicopter Corp.*, 225 Pa. Super. 349, 311 A.2d 140 (1973).)

9. Petitioner included the identical footnote at p. 10 of its Combined Petition for Panel Rehearing and Rehearing *En Banc*. The Circuit found the many case citations therein unpersuasive.

10. *Coy v. Richard's Industries, Inc.*, 428 N.W.2d 734 (Mich. Ct. App. 1988), *appeal denied*, 432 Mich. 856 (Mich. 1989).

rule in *Squibb*, as it is inapplicable to this case. Rather, the Circuit examined the relevant Michigan state law, applied it to the facts, and reversed the District Court's grant of summary judgment on Hollister's implied warranty/failure to warn claim. The Amended Opinion does not in any way, shape or form constitute "new law" in Michigan, but adheres to well-reasoned and long-standing legal principles.[11]

II.

THE SIXTH CIRCUIT CONSIDERED ONLY THE EVIDENCE IN THE RECORD ON REHEARING.

Point II of Dayton Hudson's Petition asserts that the Sixth Circuit panel improperly considered "new evidence" in the form of the "Schulz Affidavit" upon rehearing (Pet., pp. 23-25), in contravention of Fed. R. Civ. P. 60(b) and Fed. R. App. P. 40(a)(2). However, Dayton Hudson fails to offer a single citation from the Amended Opinion where the panel referred to or specifically considered the Schulz affidavit. This is because the Amended Opinion does not make a single reference to "new evidence" offered on rehearing, or the Schulz affidavit.

Indeed, the Schulz affidavit merely provided the maximum operating temperatures of the electric burners on Hollister's stove. Each burner reached a maximum

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11. The Petition characterizes the *Piercefield* case as "stale". (Pet., p. 15) However, this case has been cited favorably in at least 164 cases since 1965, including *Prentis*, *Gregory* and *Glittenberg*, all cases upon which Dayton Hudson principally relies.

temperature of between 1,000 and 1,100 degrees Fahrenheit. This result is consistent with evidence already in the record and provided in Appellant's combined petition for panel rehearing and rehearing *en banc*.

The record included ample evidence concerning the temperature reached by burners on the high setting on General Electric ranges. More importantly, however, nothing in the panel's Amended Opinion suggests that it relied on the affidavit which Dayton Hudson characterizes as new evidence. Thus, no basis exists for Dayton Hudson's argument that the panel improperly relied on the affidavit in concluding that plaintiff's proof was sufficiently "credible" to permit a jury to consider her failure to warn claim.

III.

DAYTON HUDSON'S ASSERTION THAT THE SIXTH CIRCUIT VIOLATED ITS DUE PROCESS RIGHTS IS WITHOUT MERIT.

A. DAYTON HUDSON'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* ASSERTED THE IDENTICAL LEGAL ARGUMENT IT NOW FOISTS ON THIS COURT.

Dayton Hudson's petition asserts "[b]ecause the panel issued its amended opinion without having heard from Hudson's on so much as a single topic that was the subject of amendment, it can hardly be said that Hudson's was granted a meaningful opportunity to be heard." This statement is not supported by the facts. First, one has *no right* to be heard in opposition to a rehearing petition.

(*See* Fed. R. App. P. 35(e) and 40(a)(3)[12]) Absent a right to be heard, Dayton Hudson's due process rights certainly could not have been violated. Second, the Court need only review Dayton Hudson's Combined Petition for Panel Rehearing and Rehearing *En Banc* ("the Combined Petition") to confirm that Dayton Hudson presented the identical arguments, relying on the same cases, to the Sixth Circuit. Dayton Hudson's petition, at Points B(1), (2) and C, argues the Sixth Circuit's Amended Opinion conflicts with Michigan State Court holdings in, *inter alia*, *Smith v. E.R. Squibb*, *Prentis v. Yale Manufacturing*, *Gregory v. Cincinnati*, and *Coy v. Richards Industries, Inc.*

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12. Fed. R. App. P. 35(e) provides:

Rule 35. En Banc Determination

* * * *

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response.

Fed. R. App. P. 40(a)(3) provides:

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

* * * *

(3) Answer. Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

This is the identical argument Dayton Hudson previously asserted at Points II(B), (C), and (D), of its combined petition. (Defendant-Appellee's Combined Petition For Rehearing at pp. 7-12)[13] The Circuit considered Dayton Hudson's arguments and concluded the "issues raised" in the petitions were fully considered upon the original submission and decision of the case." (Pet., p. 48a) Therefore, as Dayton Hudson previously made the identical arguments to the Circuit Court that it now makes to this Court, Dayton Hudson cannot now suggest that it did not have an opportunity to be heard. Dayton Hudson presented its theory of liability to the circuit which was squarely rejected.

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13. Dayton Hudson's points on its Combined Petition in the Circuit Court were:

> B. Regardless of Whether the Theory Pleaded is Negligence or Breach of Implied Warranty and Regardless of Whether the Claim is one for Design Defect or Failure to Warn, the Same Proof is Required Against a Manufacturer.
>
> C. Regardless of Whether the Claim is Pleaded Under a Theory of Negligence of Implied Warranty, the Required Proof Against a Retailer is the Same, Especially in Failure to Warn Cases.
>
> D. Where, as Here, the Panel Concluded that Plaintiff Failed to Create a Genuine Issue of Material Fact Against the Manufacturer, the Retailer Must be Dismissed Due to the Derivative Nature of the Claim.

B. THE FAILURE TO WARN CLAIM WAS NEVER ABANDONED AND WAS INCLUDED BY BOTH PARTIES IN THE FINAL JOINT PRE-TRIAL STATEMENT.

Dayton Hudson's petition erroneously asserts that Hollister waived her failure to warn claim, as it was not included in the Final Joint Pre-Trial Statement (the "Statement").[14] Both parties addressed the failure to warn issue in the Statement. Hollister included as one of her contested legal issues, the following:

> Did Dayton Hudson have a duty to warn as to the specific nature and magnitude of the risk associated with the clothing it sold?

(Statement, at C-2, #14) Dayton Hudson also addressed this issue, and raised it in the Statement, under Tab C-3, listing as one of defendant's contested legal issues, the following:

> Did Hudson's have a duty to warn of the risk that clothing burns?

(Statement, C-3, #36)

The Sixth Circuit determined that this issue had "been properly raised both below and on appeal" and concluded that it was an issue for the jury. It rejected the District Court's application of the open and obvious doctrine, stating:

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14. Dayton Hudson made this identical argument to the Circuit in its Combined Petition at pages 2-4. The Circuit rejected this argument.

> The district court disposed of Hollister's failure to warn argument in a cursory manner, concluding that the danger inherent in having clothing come into contact with a hot stove is "open and obvious." We find this analysis to be oversimplified. It is true that a reasonable person would know that clothing is flammable; the question, however, is one of degree.

(citation omitted) (App. p. 18a)

As both parties raised the question of failure to warn in the Final Joint Pre-Trial Statement and the Circuit recognized the merits of the cause of action, it certainly cannot be said that this issue was waived.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for writ of certiorari should be denied in all respects.

Respectfully submitted,

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